No. 94-1963

(4)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

JILL NESLADEK, AS TRUSTEE FOR THE HEIRS AND NEXT OF KIN OF JEREMY J. NESLADEK, DECEDENT, *Petitioner*,

v.

FORD MOTOR COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR FORD MOTOR COMPANY IN OPPOSITION

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38 pp

QUESTIONS PRESENTED

1. Whether this Court should review the Eighth Circuit's assessment of well-established Minnesota choice of law principles, which the court of appeals reasonably interpreted to require application of Nebraska's 10-year statute of repose to petitioner's tort claims.

2. Whether this Court should review the Eighth Circuit's exercise of discretion whether to certify the choice of law issue to the Minnesota Supreme Court.

RULE 29.1 STATEMENT

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%:

Autolatina America, Inc.
Dobco Life Insurance Company
Ford Holdings
Great Mall of the Bay Area Management Company

Argentina
- Autolatina Argentina S.A.
- Invercred Compania Financiera S.A.

Australia
- Ford Motor Company of Australia Limited

Belgium
- Ford Credit N.V.
- Ford Motor Company (Belgium) N.V.
- Axus, S.A.

Brazil
- Apolo - Administradora de Bens S/C Ltda.
- Autolatina S.A.
- Inter-Locadora S/A

Canada
- Ford Motor Company of Canada, Limited
- TCG, International

Denmark
Ford Motor Company A/S

Finland
Oy Ford Ab

Germany
Ford Werke-Aktiengesellschaft & Co. Leasing KG

Holland
Ford Nederland B.V.

Netherlands
Ford Credit B.V.

Norway
Ford Motor Norge A.S.
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

Spain
Ford Administracion I, S.A. (formerly Ford Credit Entidad de Financiacion, S.A.)

Sweden
Ford Motor Company Aktiebolag

Switzerland
Ford Motor Company (Switzerland) S.A.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 2

REASONS FOR DENYING THE PETITION 10

I. THE COURT OF APPEALS' FAITHFUL APPLICATION OF MINNESOTA CHOICE OF LAW PRINCIPLES DOES NOT WARRANT THIS COURT'S REVIEW 13

A. The Court Of Appeals Reasonably Concluded That Maintenance Of Interstate Order Is A Factor In Minnesota Choice Of Law Analysis In Tort Cases 15

B. The Court Of Appeals Reasonably Concluded That Forum Shopping Is Relevant To Minnesota Choice Of Law Analysis 18

C. The Eighth Circuit's Decision Does Not Conflict With Rulings Of Other Courts Of Appeals Or Of This Court 20

II. THE COURT OF APPEALS' DECISION NOT TO CERTIFY ISSUES DETERMINABLE THROUGH ITS OWN ANALYSIS OF STATE LAW DOES NOT WARRANT THIS COURT'S REVIEW 22

TABLE OF CONTENTS—Continued

Page

A. This Court's Precedents Establish That A Federal Court Has Broad Discretion Whether To Certify A State Law Question To The State Supreme Court 23

B. The Court Of Appeals Did Not Abuse Its Discretion By Denying Petitioner's Motion For Certification 25

CONCLUSION 27

TABLE OF AUTHORITIES

Cases: Page

Air Crash Disaster, In re, 769 F.2d 115 (3d Cir. 1985) 21

Beard v. *J.I. Case Co.*, 823 F.2d 1095 (7th Cir. 1987) 21

Bernhardt v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956) 14, 17

Berschauer/Phillips Constr. Co. v. *Seattle School Dist. No. 1*, 881 P.2d 986 (Wash. 1994) 12

Bigelow v. *Halloran*, 313 N.W.2d 10 (Minn. 1981) 15

Boreen v. *Christensen*, 884 P.2d 761 (Mont. 1994) 12

Butner v. *United States*, 440 U.S. 48 (1979) 11

City of Houston v. *Hill*, 482 U.S. 451 (1987) 25

Commissioner v. *Estate of Bosch*, 387 U.S. 456 (1967) 13

Diginet, Inc. v. *Western Union ATS, Inc.*, 958 F.2d 1388 (7th Cir. 1992) 24

Ferens v. *John Deere Co.*, 494 U.S. 516 (1990) . . . 21, 22

Fischer v. *Bar Harbor Banking & Trust Co.*, No. 88-1084, 489 U.S. 1018 (1989). 23

Givens v. *Anchor Packing, Inc.*, 466 N.W.2d 771 (Neb. 1991) 7

TABLE OF AUTHORITIES—Continued

Page

Hague v. *Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1979), aff'd, 449 U.S. 302 (1981) 7, 8, 19, 26

Haring v. *Prosise*, 462 U.S. 306 (1983) 11

Hatfield v. *Bishop Clarkson Mem. Hosp.*, 701 F.2d 1266 (8th Cir. 1983) 25

Jepson v. *General Cas. Co.*, 513 N.W.2d 467 (Minn. 1994) 16, 17, 19

Johnson v. *John Deere Co.*, 935 F.2d 151 (8th Cir. 1991) 25

Kaiser Steel Corp. v. *W.S. Ranch Co.*, 467 P.2d 986 (N.M. 1970) 12

Kaiser v. *Memorial Blood Ctr.*, 938 F.2d 90 (8th Cir. 1991) 25

Keeton v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984) 21, 22

Klaxon Co. v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) 4, 13, 20

L. Cohen & Co. v. *Dun & Bradstreet, Inc.*, 629 F. Supp. 1419 (D. Conn. 1986) 24

Lehman Bros. v. *Schein*, 416 U.S. 386 (1974) 12, 23, 25, 26

TABLE OF AUTHORITIES—Continued

Page

Lommen v. *City of East Grand Forks*, 522 N.W.2d 148 (Minn. Ct. App. 1994), pet. for rev. granted (Minn. Dec. 2, 1994) 7, 9, 17

Mahne v. *Ford Motor Co.*, 900 F.2d 83 (6th Cir. 1990) 21

Meagher v. *Kavli*, 88 N.W.2d 871 (Minn. 1958)) 6

Milkovich v. *Saari*, 203 N.W.2d 408 (Minn. 1973) 4, 5, 7, 15, 16, 26

Mitchell v. *Lone Star Ammunition, Inc.*, 913 F.2d 242 (5th Cir. 1990) 21

Myers v. *Government Employees Ins. Co.*, 225 N.W.2d 238 (Minn. 1974) 6, 8, 9, 16, 18

Oklahoma Tax Comm'n v. *Chickasaw Nation*, No. 94-771, 1995 WL 352834 (U.S. June 14, 1995) . . . 11

Perkins v. *Clark Equip. Co.*, 823 F.2d 207 (8th Cir. 1987) 25

Salve Regina College v. *Russell*, 499 U.S. 225 (1991) 14

Schwartz v. *Consolidated Freightways Corp.*, 221 N.W.2d 665 (Minn. 1974) 15

Turcotte v. *Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974) 20, 21

TABLE OF AUTHORITIES—Continued

Page

Vandenbark v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) 14, 17

Virginia v. *American Booksellers Ass'n*, 484 U.S. 383 (1988) 26

West v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940) 13

Zaretsky v. *Molecular Biosystems, Inc.*, 464 N.W.2d 546 (Minn. Ct. App. 1990) 7, 19

Statutes:

28 U.S.C. § 1404 21

Minn. Stat. § 604.03 3

Neb. Rev. Stat. § 25-224 2

Miscelianeous:

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TABLE OF AUTHORITIES—Continued

Page

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Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 Ark. L. Rev. 305 (1994) 25

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BRIEF FOR FORD MOTOR COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-24a) is reported at 46 F.3d 734. The opinion of the district court (Pet. App. 44a-60a) is reported at 876 F. Supp. 1061.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1995. The petition for rehearing was denied on March 28 1995. Pet. App. 1a. The petition for a writ of certiorari was filed on June 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. The Underlying Accident

On April 18, 1990 three-year-old Jeremy Nesladek was severely injured when his father Ken got out of the family's Ford pickup truck and the truck moved backwards and rolled over Jeremy. Jeremy died from his injuries on February 20, 1992. All these events took place on the family's farm in Nebraska. Pet. App. 3a, 45a.

The truck involved in this accident was not an original Ford vehicle but a composite of two different pickup trucks—a 1973 Ford F-350 and a 1976 Ford F-250—that had both been bought used by Ken Nesladek in Nebraska. C.A. App. 8, 27. In 1989, Nesladek and another Nebraska resident, Harvey Kreikemeier, combined the chassis of the 1973 truck with the cab of the 1976 truck. Pet. App. 45a-46a. During that process, Kreikemeier removed the automatic transmission of the 1973 truck, replaced components, and reinstalled and readjusted the transmission. C.A. App. 54-55.

The Nesladeks asserted that their son's accident resulted from this composite truck jumping from "park" to "reverse," a purported design defect. Respondent Ford Motor Company ("Ford") contended that there was no design defect and that improper adjustments made by Kreikemeier while combining the two old trucks may have caused the accident. Pet. App. 46a & n.2.

B. Petitioner's Move To Minnesota And Suit Against Ford

Nebraska's statute of repose requires that any product liability action be commenced within ten years of the first sale of the product at issue. Neb. Rev. Stat. § 25-224(2), Pet. App. 66a. It therefore precluded a product liability action against Ford relating to the composite truck after 1986 at the latest—four years before Jeremy Nesladek's accident. Pet. App. 4a. Minnesota's statute, on the other hand,

provides a defense to a product liability claim where "the injury was sustained following the expiration of the ordinary useful life of the product," which means "the period during which with reasonable safety the product should be useful to the user." Minn. Stat. § 604.03 subds. 1 & 2; Pet. App. 64a.

Following their son's accident, Ken Nesladek and his wife Jill, who is petitioner in this case as trustee for Jeremy's heirs and next of kin, consulted one of their current attorneys, Eric Kruger. Pet. App. 8a; C.A. App. 17. They learned that a product liability lawsuit against Ford under Nebraska law "was a non-starter, whereas Minnesota's law was more favorable to a suit against Ford." Pet. App. 8a. Armed with this knowledge, the Nesladeks moved from Nebraska to Minnesota. Their "ability to bring suit under Minnesota law," the district court held, was "a primary consideration in the family's relocation." *Id.* at 56a.[1] Apart from this forum-shopping move, the sole connections between petitioner or her son's accident and the state of Minnesota were the "tenuous" ones that Ford did business in Minnesota (as it does in every state) and that the transmission in the 1976 vehicle was installed at a Minnesota Ford plant. *Id.* at 10a-11a, 55a-56a.

After their move, petitioner filed a product liability suit against Ford in Minnesota state court. Ford removed the case to federal district court in Minnesota on diversity grounds. Ford then moved for summary judgment, arguing that under Minnesota choice of law principles petitioner's suit was gov-

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[1] Ken Nesladek cited three reasons for the family's move to Minnesota as "probably equal" in importance: "the law" that was more favorable in Minnesota; Jill Nesladek's desire to attend college at St. Scholastica in Duluth (which she has not done); and the family's desire to move from the site of Jeremy's accident. Pet. App. 8a n.5, 56a-57a.

erned—and barred—by the Nebraska statute of repose. Pet. App. 3a, 46a.

C. Minnesota Choice Of Law Principles

Under this Court's precedents, federal courts sitting in diversity in Minnesota apply Minnesota's choice of law rules. Pet. App. 5a; see, *e.g.*, *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). The district court (Pet. App. 49a-59a) and court of appeals (*id.* at 4a-15a) each determined, citing Minnesota case law, that Minnesota choice of law analysis proceeds in three stages. The issue at the first stage is whether there is a true conflict between the laws of different states so that choosing between them may determine the outcome of the suit. *Id.* at 4a-5a, 49a-50a. If there is such a conflict, a court next determines whether that conflict involves a substantive or procedural rule of law. If the conflict concerns a procedural rule, the law of the forum automatically applies. If the law at issue is substantive, the choice of law analysis continues to a third stage. *Id.* at 5a, 50a. At that final stage, Minnesota courts since *Milkovich* v. *Saari*, 203 N.W.2d 408 (Minn. 1973), have weighed Professor Robert Leflar's five "choice influencing factors" to determine which law governs. Under this standard, the court considers the effect of each possible choice of law in the particular case on (1) predictability, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancement of the forum state's governmental interests, and (5) promotion of the better rule of law. Each of these five factors in turn depends on a variety of factual considerations. Pet. App. 9a-15a, 54a.

D. The District Court's Decision

The district court carefully followed each step mandated by Minnesota choice of law rules. Initially, it determined that a genuine conflict of laws existed "[b]ecause Nebraska law would bar this action and Minnesota law would not." Pet. App. 49a-50a. Moving to the second stage of the analysis,

the district court denied petitioner's motion to certify the question whether Nebraska's statute of repose is procedural or substantive to the Minnesota Supreme Court, holding that although the state Supreme Court has not "expressly characterized a products liability statute of repose, it has identified principles by which to distinguish between procedural rules and substantive rights." *Id.* at 48a. Applying those principles, the district court ruled that Nebraska's statute of repose was substantive. *Id.* at 52a.

Turning to the *Milkovich* test, the district court held that two factors dictated that Nebraska's statute of repose applied to bar petitioner's suit. "[M]aintenance of interstate order" required application of the law of a state with a "'substantial connection'" to the suit. Pet. App. 55a, quoting *Milkovich*, 203 N.W.2d at 412. Minnesota, however, had but "tenuous" contacts with the parties and the accident at issue. Pet. App. 55a-56a. In addition, one contact with Minnesota—the Nesladeks' residence in the state—resulted from petitioner's forum shopping. *Id.* at 56a-57a. Holding that Minnesota case law established that "[t]he interest in preventing forum shopping increases where a state's contacts are minimal" (*id.* at 56a), the district court concluded that "[b]ecause Minnesota has a minimal connection to the facts of this action and because application of Minnesota law would facilitate blatant forum shopping, the maintenance of interstate order factor strongly favors the application of Nebraska law." *Id.* at 57a.

The district court held that Minnesota's "governmental interest" also strongly favored Nebraska law. Minnesota law defines the state's interest in compensating plaintiffs by reference to its interest in ensuring that "those injured and receiving medical care in the state" can "meet financial obligations without state assistance." Jeremy Nesladek neither was injured nor received medical care in Minnesota, so the state lacked any economic interest. On the other hand, Minnesota's useful life statute and Nebraska's statute of repose advanced the same general policies of limiting a

manufacturer's liability for aging products. Petitioner's "action implicates a clear Nebraska interest not in conflict with Minnesota policy," the district court ruled, while "Minnesota lacks any significant interest" in petitioner's suit. Pet. App. 57a-59a.

The relevant factors in Minnesota choice of law analysis thus compelled application of the Nebraska statute that barred petitioner's suit. On that basis, the district court granted Ford's summary judgment motion. Pet. App. 59a.

E. The Eighth Circuit's Decision

The court of appeals denied petitioner's motion to certify the choice of law issue in this case to the Minnesota Supreme Court. Pet. App. 25a, 40a-41a. Reviewing the choice of law issue *de novo*, the court then affirmed. Finding there to be "no question that this case presents a true conflict of laws," the court undertook a careful application of Minnesota choice of law principles. *Id.* at 4a-5a.

1. Substantive v. procedural law. Applying Minnesota's long-established test "that substantive law is that part of law which creates, defines, and regulates rights" (*Meagher* v. *Kavli*, 88 N.W.2d 871, 879-880 (Minn. 1958)), and guided by recent Minnesota Court of Appeals decisions discussing that test, the Eighth Circuit found it "relatively easy to classify" Nebraska's statute of repose and Minnesota's useful life statute as substantive. Pet. App. 5a. The Nebraska law satisfied the *Meagher* test because it "directly impacts on the accrual of a cause of action" by operating "as a statutory bar independent of the [litigants'] actions"; the Minnesota statute did so because it "creates the right to present a substantive defense" to a product liability suit. *Id.* at 6a-7a.

The court of appeals held that two other state law criteria supported this conclusion. First, Nebraska's own characterization of its statute was relevant under *Myers* v. *Government Employees Ins. Co.*, 225 N.W.2d 238, 241 (Minn. 1974), and there was "little doubt" that the Nebraska

Supreme Court would treat the statute as substantive given its description of a statute of repose as creating an "'immunity'" and "'substantive rights.'" Pet. App. 7a-8a (quoting *Givens* v. *Anchor Packing, Inc.*, 466 N.W.2d 771, 774 (Neb. 1991)).

Second, the Minnesota Court of Appeals in *Zaretsky* v. *Molecular Biosystems, Inc.*, 464 N.W.2d 546, 550 n.2 (Minn. Ct. App. 1990), had stated that it was "reluctant to classify anything as procedural" because that would automatically trigger application of Minnesota law and so had "the potential [to] encourage forum shopping." In light of *Zaretsky*, the Eighth Circuit held, petitioner's forum shopping "further reduces any possibility that a Minnesota court would classify either of the statutes at issue here as procedural." Pet. App. 8a.

2. The Leflar choice of law factors. Having concluded that Minnesota courts would characterize both statutes at issue as substantive, the court of appeals was required to consider the Leflar choice of law factors set out in *Milkovich* to determine if Nebraska or Minnesota law governed petitioner's suit. Pet. App. 9a.

The court of appeals rejected petitioner's contention that only the last two Leflar factors apply in tort cases. The court acknowledged that "some Minnesota opinions dealing with [choice of law] in tort cases skip the analysis of * * * the first three considerations." Pet. App. 9a-10a. But it pointed out that the Minnesota Supreme Court had "looked at all five factors" in *Hague* v. *Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979), aff'd, 449 U.S. 302 (1981), a case with "elements of both tort and contract," and that the state court of appeals had just applied all five factors in a tort case in *Lommen* v. *City of East Grand Forks*, 522 N.W.2d 148 (Minn. Ct. App. 1994), pet. for rev. granted (Minn. Dec. 2, 1994). The court of appeals held that the better view was that Minnesota law did not preclude application of the first three factors in tort cases. Pet. App. 10a n.6.

Citing Minnesota case law, the Eighth Circuit held that factors one (predictability of result) and three (simplification of the judicial task) were nevertheless of "little relevance" in this case. Predictability was not implicated because accidents are unplanned, "so in the ordinary tort case the parties can claim no legitimate expectation that a certain state's law would apply." Pet. App. 9a. Simplifying the judicial task was not a concern either, "since both [Nebraska and Minnesota law] are straightforward." *Id.* at 12a.

3. Maintenance of interstate order. The second Leflar factor—maintenance of interstate order—is satisfied only if a state "'has sufficient contacts with and interest in the facts and issues being litigated.'" Pet. App. 10a (quoting *Myers*, 225 N.W.2d at 242). But Minnesota, the court of appeals held, had "only the remotest connection with the subject matter of [petitioner's] case." *Id.* at 11a. The allegedly defective transmission part, although manufactured and assembled in Indiana, was installed in the 1976 truck at a Minnesota plant. In contrast to this very minimal contact, the Nesladeks' composite truck was purchased, licensed, modified, and maintained in Nebraska; the accident occurred in Nebraska; and Jeremy Nesladek received medical treatment and incurred medical expenses in Nebraska. *Ibid.*

Minnesota's *only* other contact with the litigation was petitioner's residence in Minnesota and consequent trusteeship under Minnesota law. This contact, however, was the result of "admitted * * * forum shopping" and suggested that the application of Minnesota law would "undercu[t] the maintenance of interstate order." Pet. App. 11a. In treating this concern as relevant, the Eighth Circuit followed the Minnesota Supreme Court's direction in *Hague*, 289 N.W.2d at 49, that, under the "maintenance of interstate order" heading, a court may "consider whether or not application of Minnesota law will encourage forum shopping" and that this should be "a strong consideration" in a case like the present one where a plaintiff "moved to [Minnesota] for the purpose

of bringing suit." Pet. App. 11a (also citing the Minnesota Court of Appeals' holding in *Lommen*, 522 N.W.2d at 151, that a "particular concern" of Minnesota choice of law principles was "to minimize forum shopping").

Because Nebraska's connection with petitioner's suit was strong and Minnesota's remote, and because petitioner came to Minnesota as a forum shopper, the court of appeals concluded that the maintenance of order factor favored the choice of Nebraska law. Pet. App. 11a.

4. Advancement of Minnesota's governmental interests. Under the fourth Leflar factor—the advancement of the forum state's governmental interests—the court of appeals held that it was bound by Minnesota precedents to consider the "relative policy interests" of both Nebraska and Minnesota. In doing so, the court identified a number of pertinent considerations. First, both statutes "advance[d] the same governmental interest," limiting "liability for injury allegedly caused by older products." Second, Minnesota's interest in providing its citizens with access to its courts would be served by choosing Minnesota law. Third, on the facts of this case Minnesota's interest in avoiding forum shopping would be served by choosing Nebraska law. Fourth, Minnesota's interest in compensating tort victims was less important here than other elements of the analysis because Minnesota's useful life statute itself provided a *defense* to product liability suits and it was "purely speculative" whether petitioner could overcome that defense. Balancing all these elements, the court concluded that the "governmental interests" factor favored application of Nebraska law. Pet. App. 12a-14a.[2]

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[2] The court of appeals did not apply the "better rule of law" factor, following the Minnesota Supreme Court's admonition that this fifth Leflar factor applies "'only when other choice-influencing considerations leave the choice of law uncertain.'" Pet. App. 15a (quoting *Myers*, 225 N.W.2d at 244). The court of appeals ruled

(continued...)

Because both relevant Leflar factors pointed to Nebraska's statute of repose the court of appeals affirmed the summary judgment for Ford.[3] The court subsequently denied panel or en banc rehearing.

REASONS FOR DENYING THE PETITION

Neither of the questions presented in the petition warrants this Court's review. The first, though artfully wrapped in the guise of the *Erie* doctrine, in fact raises two questions of Minnesota law: whether Minnesota's choice of law methodology allows consideration of the "maintenance of interstate order" factor in a tort case (Pet. 8-9), and whether petitioner's forum shopping is a relevant consideration in Minnesota choice of law analysis. *Id.* at 9-12. The Eighth Circuit, after conscientiously reviewing Minnesota precedent and addressing precisely the state law arguments that petitioner repeats to this Court, answered both those questions in the affirmative. It held—quite reasonably, as we demonstrate below—that Minnesota law permits a court to weigh all five Leflar factors in a tort case such as this one and recognizes forum shopping as one of many factors relevant to a choice of law inquiry.

That petitioner disagrees with the Eighth Circuit's interpretation of Minnesota law provides no reason for further review. This Court repeatedly has held that it will not

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[2](...continued)
that, in any event, Minnesota courts would consider neither Nebraska nor Minnesota law to be objectively better, but "[e]ach merely [to] reflec[t] a different approach to the same problem." *Ibid.*

[3] Judge Lay dissented as to the application of the Leflar factors. Pet. App. 16a-23a. The dissent recognized, however, that the court's decision is of limited import because it "is not binding authority beyond this case * * * as far as Minnesota law is concerned." *Id.* at 16a.

grant certiorari to address a federal court of appeals' construction of state law so long as that construction is reasonable. *E.g.*, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, No. 94-771, 1995 WL 352834, at *6 (June 14, 1995); *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); *Butner* v. *United States*, 440 U.S. 48, 58 (1979). In fact, this Court amended what is now Rule 10.1 in 1980 to omit a longstanding provision that authorized review of a court of appeals decision resolving "an important state * * * question in a way in conflict with applicable state * * * law." This omission "reflects the Court's current lack of interest in reviewing diversity cases where the only issue is the consistency of the court of appeals decision with applicable state substantive law." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 183 (7th ed. 1993).

The Eighth Circuit perfectly understood the standards laid down by this Court for applying state conflict of law principles in diversity cases. Working within that framework, it made a careful effort to determine what Leflar factors the Minnesota courts would apply, whether Minnesota courts would consider petitioner's forum shopping, and whether Minnesota would ultimately apply Nebraska or Minnesota law here. The court of appeals' painstaking analysis of how Minnesota courts would likely resolve state law issues in these areas clearly does not merit this Court's attention.

The nature of the Eighth Circuit's inquiry also makes this case unsuitable for review. The Minnesota choice of law standard requires courts to balance a multiplicity of factors, some with numerous case-specific sub-elements. Unsurprisingly, Minnesota courts applying that standard have emphasized different considerations in different cases, leaving the proper analysis of state choice of law principles subject to flexible determinations in particular contexts. Petitioner's complaints about the decision below merely reflect the inherent uncertainties that attend the application of complex general criteria to specific facts. There will always

be such debates about the proper application of general choice of law principles under state law, but there is little this Court can usefully do to provide further guidance to the lower federal courts on these issues.

Moreover, even if the Eighth Circuit made an error in predicting how state courts would apply state conflicts law, that error would necessarily be short lived. As petitioner acknowledges (Pet. 19), the court of appeals' determination of state law is in no way binding on the state courts. State supreme courts can—and frequently do—disagree with prior federal decisions interpreting state law and articulate a new approach that federal and state courts must follow in the future. See, *e.g.*, *Boreen* v. *Christensen*, 884 P.2d 761, 767 (Mont. 1994); *Berschauer/Phillips Constr. Co.* v. *Seattle School Dist. No. 1*, 881 P.2d 986, 990-991 (Wash. 1994); *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 467 P.2d 986, 990 (N.M. 1970).

Petitioner's second question presented is even less worthy of a grant of certiorari. It asks this Court to abandon the well-settled principle—which has operated successfully for more than 20 years—that "use [of the certification process] in a given case rests in the sound discretion of the federal court." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). Without even acknowledging that its argument conflicts with this Court's ruling that certification is not "obligatory" when "there is doubt as to local law" (*id.* at 390-391), petitioner contends that federal courts should have no "discretion to decide dispositive questions of state law" but should be required to certify such questions "when certification is an option." Pet. i. Petitioner provides no good reason for this Court to revisit its precedents on this settled issue.

Nor is this a case in which a complete absence of relevant state court decisions or other great uncertainty in state jurisprudence rendered failure to certify the choice of law question to the Minnesota Supreme Court an abuse of discretion. The court of appeals fully analyzed the modern

body of Minnesota law on conflicts—the same decisions discussed in the petition—before rendering its decision. The Eighth Circuit was certainly free to weigh its own ability to synthesize state precedent, together with the burden on the parties and time involved in certification, against the marginal additional certainty that would result from certification. It acted well within the scope of its discretion when it elected not to certify the choice of law issue in this case to the Minnesota Supreme Court.

I. THE COURT OF APPEALS' FAITHFUL APPLICATION OF MINNESOTA CHOICE OF LAW PRINCIPLES DOES NOT WARRANT THIS COURT'S REVIEW.

The basic guidelines for a federal court called upon to resolve conflicts of law in a diversity case have long been settled and may be summarized briefly. Under the *Erie* doctrine, courts in diversity cases "must follow conflict of laws rules prevailing in the states in which they sit." *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494 (1941). The "proper function" of federal courts in such cases "is to ascertain what [that] state law is." *Id.* at 497. In carrying out that task, federal courts are to look to "the State's highest court [as] the best authority on its own law." *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967). If there is no controlling decision by the state's highest court, "then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Ibid.* In particular, a decision by an intermediate state appellate court "is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940).

In ascertaining state law, moreover, the federal court is to take into account any "developing line of authorities that casts a shadow over the established ones" and any "doubts

or ambiguities" in state court opinions. *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 205 (1956). Thus, a diversity court's "responsible determination of state law involves something more than checking the digests for state court decisions on point." 19 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4507, at 87 (1982). It is not to follow blindly any individual state court decision, but to "functio[n] as a proxy for the entire state court system," applying "the law that it conscientiously believes would have been applied in the state court system." *Id.* at 89.

Finally, a federal court of appeals reviews a district court's determination of state law *de novo*. *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991). In doing so, the court of appeals is to inquire into state law at the time of its decision. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941). Clarifications of or ambiguities introduced into state law by state court decisions issued during the pendency of an appeal in a diversity case must therefore be considered.

There is no doubt that the Eighth Circuit followed all these guiding principles in ascertaining how Minnesota courts would resolve the choice of law issue in this particular case, rendering further review unnecessary. The court of appeals considered the relevant decisions of the Minnesota Supreme Court and Court of Appeals, including authority that postdated the district court's decision. It acknowledged ambiguities in state decisions and resolved those ambiguities by analyzing the entire body of state case law. And, unquestionably, it decided that Nebraska law governs petitioner's suit because it reasonably believed that the Minnesota courts would so hold.

A. The Court Of Appeals Reasonably Concluded That Maintenance Of Interstate Order Is A Factor In Minnesota Choice Of Law Analysis In Tort Cases.

Petitioner asserts (Pet. 8-9) that the Minnesota Supreme Court has "clearl[ly] pronounce[d]" that "only the last two items of Professor Leflar's five-point [choice of law] methodology are relevant to tort cases." She complains that the Eighth Circuit "ignored" that "mandat[e]" when it considered the second factor in Minnesota's choice of law methodology, which is the maintenance of interstate order. *Id.* at 9. In fact, Minnesota law is much more flexible on this issue than petitioner pretends. A review of the Minnesota cases demonstrates the reasonableness of the Eighth Circuit's conclusion that Minnesota does not "*per se* preclud[e] the application of any of the five Leflar factors in tort cases." Pet. App. 10a.

To be sure, the Minnesota Supreme Court observed tersely in two cases, decided 21 and 15 years ago, that "only the last two items of Professor Leflar's five-point methodology are relevant to tort cases." *Schwartz* v. *Consolidated Freightways Corp.*, 221 N.W.2d 665, 668 (Minn. 1974); *Bigelow* v. *Halloran*, 313 N.W.2d 10, 12 (Minn. 1981) (relying on *Schwartz*). But petitioner's myopic focus on those two decisions (Pet. 8-9) hides another, longer line of Minnesota case law that fully supports the Eighth Circuit's ruling that there is no *per se* bar to considering the first three factors in tort cases.

The starting point for analysis is the Minnesota Supreme Court's *Milkovich* decision, which first adopted the Leflar choice of law factors. Although *Milkovich* is sometimes cited for the proposition that the first three factors do not apply in tort cases, *Milkovich* in fact announced a more flexible principle. The supreme court in *Milkovich*—a tort case—considered all five factors. It held that the first, predictability of choice of law, was of "relative unimpor-

tance" in tort actions—not that it was "irrelevant." 203 N.W.2d at 416. It held that the second factor, simplification of the judicial task, "need not concern us to any great extent" in the particular circumstances of the case, because "our judicial system could * * * apply the [foreign] guest statute rule * * * as readily as our common-law rule." *Id.* at 416-417. And it held that the third factor, interstate relations, supported its choice of Minnesota law because Minnesota had "a substantial connection with the facts and issues involved," the accident and the tort victim's medical treatment having taken place in the state. *Id.* at 417. Thus, while the court held that the last two factors were the "compelling" ones "in this case" (*ibid.*), it did not treat them as the *only* operative factors.

In *Myers* v. *Government Employees Ins. Co.*, 225 N.W.2d 238, 242 (Minn. 1974), another tort case, the Minnesota Supreme Court again considered all five Leflar factors. It held only that the first three factors "present few problems in tort cases." "Predictability of results applies *primarily* to consensual transactions," it held; "maintenance of interstate order is *generally* satisfied" if there are sufficient contacts between the action and the state whose law is chosen, which there were in *Myers*; and the judicial task was not complicated, the court found, *"in this case." Ibid.* (emphases added).

Milkovich and *Myers* are perfectly consistent with the Minnesota Supreme Court's latest teaching on choice of law. In *Jepson* v. *General Cas. Co.*, 513 N.W.2d 467, 470 (Minn. 1994)—a case with "aspects of both contract and tort"—the court applied all five Leflar factors. Even more important, the court adopted a flexible, case-specific approach that is quite at odds with petitioner's assertion that the first three factors are never to be considered in tort cases. The court explained that the Leflar factors "were put forward * * * as a way of laying bare the reasons for choosing to apply one state's law over another," and that they "*were not*

intended to spawn the evolution of set mechanical rules but instead to prompt courts to carefully and critically consider each new fact situation and explain in a straight-forward manner their choice of law." *Ibid.* (emphasis added). Rather than apply the Leflar factors as "mechanical rules," courts are "to wrestle with each situation anew." *Ibid.* Expressly following the fact-specific *Jepson* approach to choice of law, the Minnesota Court of Appeals has recently considered all five Leflar factors in a tort case. *Lommen*, 522 N.W.2d at 150.

The Eighth Circuit's opinion considered all these cases and found the *Milkovich-Myers-Jepson-Lommen* line of authority to be most relevant. The court of appeals acknowledged that some Minnesota decisions suggested that the first three factors were inapplicable in tort cases. But, having referred during the course of its opinion to all four cases that go the other way, the court reasonably concluded that they provided the clearest guidance. Pet. App. 9a-10a.[4] The court of appeals was entitled to consider "developing line[s] of authorities" and to resolve "doubts or ambiguities" in state law as it believed the Minnesota courts would do. *Bernhardt*, 350 U.S. at 205. There is no reason for this Court to review this routine issue of state law.

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[4] Petitioner criticizes the court of appeals' citation to *Lommen* (Pet. 9) because it was on appeal to the Minnesota Supreme Court when the Eighth Circuit rendered its decision. However, *Vanden-bark*, 311 U.S. at 543, established that a diversity court must apply the law prevailing *at the time of its decision*. At that time, the court of appeals could not rationally have drawn any conclusion about the direction of Minnesota choice of law from the supreme court's mere grant of the petition to review in *Lommen*. After all the supreme court may affirm the Minnesota Court of Appeals, or reverse simply because it disagrees with the way that court balanced the Leflar factors on the particular facts.

It would be particularly inappropriate to grant certiorari here because it is evident that the court of appeals would have reached exactly the same result even if it had agreed with petitioner that Minnesota law precludes analysis of the first three Leflar factors in tort cases. The court held that the fourth factor, advancement of the forum's governmental interests, which petitioner agrees applies in tort cases, pointed decisively to application of Nebraska law. Pet. App. 12a-14a. Since that factor was determinative of the choice of law, the court of appeals would not have considered the fifth, "better law" factor. See Pet. App. 14a-15a (following the Minnesota Supreme Court's rule in *Myers*—a tort case—that "'[c]oncern for the 'better law' is part of a comprehensive test and is to be exercised only when other choice-influencing considerations leave the choice of law uncertain'" (quoting 225 N.W.2d at 244)).

B. The Court Of Appeals Reasonably Concluded That Forum Shopping Is Relevant To Minnesota Choice Of Law Analysis.

In asking this Court to review the Eighth Circuit's determination that Minnesota choice of law principles allow consideration of a party's forum shopping (Pet. 9-12), petitioner both seriously misrepresents Minnesota law and greatly exaggerates the importance the court of appeals accorded to her forum shopping tactics. The court of appeals' consideration of the Nesladeks' change of residence to try to evade the Nebraska statute of repose finds ample support in the Minnesota case law. In addition, petitioner's forum shopping did not play the "decisive" role in the ruling below that petitioner claims.

Petitioner plays fast and loose with the Minnesota cases. Minnesota courts do not narrowly "define" forum shopping as bringing suit in Minnesota after first suing elsewhere, as petitioner absurdly contends. Pet. 11. Though they treat filing a second suit in Minnesota as a type of forum shopping (see *id.* at 10-11), Minnesota courts have never once suggest-

ed that this is the *only* form that forum shopping may take. Nor, contrary to petitioner's assertion, do Minnesota courts "discoun[t] the relevance" to choice of law analysis of a plaintiff's post-accident move to Minnesota to escape the law of another state. *Id.* at 10.

On the contrary, the Minnesota Supreme Court's decision in *Hague* v. *Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1979), aff'd, 449 U.S. 302 (1981), upon which petitioner inexplicably relies, is a complete answer to both these claims. The court in *Hague* held that in conducting choice of law analysis, a court may "consider whether or not application of Minnesota law will encourage forum shopping." *Id.* at 49. And it held—in a case where the plaintiff had *not* previously filed suit in another state—that "*any evidence that plaintiff had moved to this state for the purpose of bringing suit*" would have been "*a strong consideration*" in determining choice of law. *Ibid.* (emphasis added).

The court of appeals quite properly placed principal reliance upon *Hague* when it interpreted Minnesota law to make forum shopping a relevant factor in choice of law analysis. Pet. App. 11a. But *Hague* was by no means its only source. The court of appeals also noted (*id.* at 13a) that the Minnesota Supreme Court ruled in *Jepson* that "Minnesota does not have an interest in encouraging forum shopping" and that keeping "opportunities for forum shopping * * * within reasonable bounds" was a goal in approaching choice of law questions. 513 N.W.2d at 471. And it observed (Pet. App. 8a) that the potential for forum shopping was of such great concern in *Zaretsky* v. *Molecular Biosystems, Inc.*, 464 N.W.2d 546, 550 n.2 (Minn. Ct. App. 1990), that it influenced the court's decision whether to classify a law as procedural or substantive. The Eighth Circuit's reliance on these cases was perfectly reasonable; indeed, petitioner has not been able to cite a single Minnesota precedent that cuts the other way.

Petitioner's suggestion that the court of appeals "gave decisive weight" to her forum shopping is also wide of the mark. The court of appeals considered petitioner's move to Minnesota to avoid Nebraska law as just one element in a multifaceted inquiry into the appropriate choice of law. Under the "interstate order" factor, the court of appeals gave at least equal weight to the facts that "Nebraska is the state in which almost all the events that gave rise to [petitioner's] lawsuit occurred" and that "Minnesota has only the remotest connection with the subject matter of the case." Pet. App. 11a. Under the "advancement of the forum's governmental interest" factor, the court considered "the distinct presence of forum shopping in this case" along with three other elements—the congruent goals of the Nebraska and Minnesota statutes, Minnesota's undoubted "interest in 'providing access to its courts for its citizens,'" and the negation of the state's usual interest in compensating tort victims by its provision of a "useful life" defense—before deciding "on balance" that this factor favored the choice of Nebraska law. *Id.* at 12a-14a. Because of the highly case-specific nature of the court of appeals' decision, this Court's intervention would provide no general guidance to federal courts applying state choice of law principles.

C. The Eighth Circuit's Decision Does Not Conflict With Rulings Of Other Courts Of Appeals Or Of This Court.

Petitioner's assertion (Pet. 13-14) that the Eighth Circuit's decision conflicts with decisions of the First, Third, Fifth, Sixth, and Seventh Circuits that "tolerated forum shopping" is frankly absurd. To begin with, in each case that petitioner cites the court of appeals followed the established rule that a diversity court must apply the conflicts law of the forum state. *Klaxon Co.*, 313 U.S. at 496. In not one of those cases, however, was the court of appeals called upon to apply Minnesota choice of law rules. See *Turcotte* v. *Ford Motor Co.*, 494 F.2d 173, 177-178 (1st Cir. 1974) (applying

Rhode Island conflicts law); *In re Air Crash Disaster*, 769 F.2d 115, 120 n.7 (3d Cir. 1985) (Pennsylvania law); *Mitchell* v. *Lone Star Ammunition, Inc.*, 913 F.2d 242, 249-250 (5th Cir. 1990) (Texas law); *Mahne* v. *Ford Motor Co.*, 900 F.2d 83 (6th Cir. 1990) (Michigan law); *Beard* v. *J.I. Case Co.*, 823 F.2d 1095 (7th Cir. 1987) (Wisconsin law). Petitioner is therefore trying to compare apples with oranges. Differences between the outcome of this case and the cases petitioner cites are to be expected. The decisions turn not upon conflicting views about the relevant federal principles—for there are none—but upon the entirely unsurprising fact that states have different choice of law rules.

Moreover, the decisions that petitioner claims conflict with the Eighth Circuit's ruling are remote from the facts of this case. Perhaps most important, in not one of those cases does it appear that the plaintiff moved to the forum in order to avoid a statutory bar to or other restriction upon suit in his or her prior state of residence. Thus, none of the cases involves the blatant forum shopping engaged in by petitioner. In addition, the states whose law was held applicable in petitioner's cited cases had contacts far more significant than did Minnesota in this case. For example, in *Turcotte*, where Rhode Island law was applied, it was a Rhode Island resident who was killed in the accident at issue. 494 F.2d at 177-178. In none of the cited cases did the courts consider an attempt to apply a state law with only "tenuous" links to the parties, the product, and the underlying lawsuit.

Petitioner's vague assertion (Pet. 13) that the decision below is inconsistent with *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and *Ferens* v. *John Deere Co.*, 494 U.S. 516 (1990), is equally baseless. In *Ferens*, addressing an issue of federal law, this Court held that a diversity case transferred under 28 U.S.C. § 1404(a) to another district for the convenience of the parties is governed by the choice of law rules that would have applied in the transferor court. The substantive principles governing application of state choice of

law rules in diversity cases were not in issue. Moreover, far from endorsing forum shopping as petitioner claims, this Court relied on the principle that section 1404(a) "should not create or multiply opportunities for forum shopping." 494 U.S. at 523. *Keeton* is still further removed. There, the question was whether the Due Process Clause forbade application of New Hampshire's long-arm statute to acquire personal jurisdiction over a defendant alleged to have libeled plaintiff in thousands of copies of magazines sold in the state. In ruling that it did not, this Court said nothing about how a diversity court should go about discerning state law, nothing about state choice of law principles, and, of course, nothing about Minnesota choice of law rules.

Petitioner has identified no conflict between the decision below and decisions of other circuits or of this Court. She has not shown that the Eighth Circuit's unremarkable interpretation of Minnesota choice of law principles raises any important federal issue. Nor has she demonstrated how review of the court of appeals' fact-bound synthesis of multiple choice of law factors could provide useful guidance to the federal courts. Certiorari on the first question presented should therefore be denied.

II. THE COURT OF APPEALS' DECISION NOT TO CERTIFY ISSUES DETERMINABLE THROUGH ITS OWN ANALYSIS OF STATE LAW DOES NOT WARRANT THIS COURT'S REVIEW.

This Court has long held that a federal court's decision whether to certify a question to a state supreme court is discretionary. The Eighth Circuit did not abuse its discretion in declining to certify the choice of law questions at issue and instead analyzing the substantial body of Minnesota choice of law cases to determine how a Minnesota court

would rule. No purpose would be served by granting further review.[5]

A. This Court's Precedents Establish That A Federal Court Has Broad Discretion Whether To Certify A State Law Question To The State Supreme Court.

Petitioner urges that this Court "require" federal courts sitting in diversity to certify outcome-dispositive questions to state supreme courts. Pet. 18. But the Court disposed of such a contention over two decades ago, ruling that use of the certification procedure "rests in the sound discretion of the federal court." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). Even where there is some "doubt as to local law," the Court emphasized, resort to certification is not "obligatory." *Id.* at 390-391. Petitioner has provided no basis for revisiting this well-established standard.

Indeed, courts and commentators have widely recognized that limiting the discretion of federal courts would have undesirable consequences. If federal courts were "required" to certify state law issues—even in cases like this one where the federal court is readily able to discern the applicable state law principles—many litigants would find it strategically advantageous to interrupt federal proceedings with the lengthy delays required for a state high court response. They could thus force substantial delays in the resolution of federal suits and burden their opponents with attendant costs. See *Lehman Bros.*, 416 U.S. at 395 (Rehnquist, J., concurring) (noting "additional time and money" required for certification).

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[5] This Court previously has denied certiorari when it has been asked to limit the discretion of federal courts to determine when certification of state law issues is appropriate. *E.g.*, *Fischer* v. *Bar Harbor Banking & Trust Co.*, No. 88-1084, 489 U.S. 1018 (1989).

The adverse impact would extend to state courts as well because already overcrowded state court dockets would become burdened with a proliferation of certified questions. As Judge Cabranes has commented, "[i]t would impose an unreasonable and unnecessary burden on [state supreme] [c]ourt[s] if the certification process were to be invoked routinely whenever a federal court was presented with an unsettled question of [state] law." *L. Cohen & Co.* v. *Dun & Bradstreet, Inc.*, 629 F. Supp. 1419, 1423 (D. Conn. 1986). See also 1A J. Moore, *Moore's Federal Practice* 2162 (2d ed. 1995) (urging care in the use of certification based on "[d]ue regard for the interests of the states in conserving their judicial resources").[6]

Petitioner argues (Pet. 22) that "[r]equiring certification" would prevent incorrect constructions of state law by federal courts. But the Eighth Circuit, we have shown (at 14-29), did not misconstrue Minnesota law. In any event, even if a federal court does err in interpreting state law, state courts are themselves perfectly capable of correcting such nonbinding errors in subsequent cases.[7] Moreover, studies show that federal courts sometimes make useful contributions to developing state law by their decisions rendered in diversity cases. See Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv. L. Rev. 317, 325-326 (1977); Landes & Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. Legal Stud. 367, 372, 386 (1980).

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[6] The unwarranted burden on state high courts is well illustrated by this case, where petitioner seeks to have certified no fewer than *four* questions. Pet. 16.

[7] See *Diginet, Inc.* v. *Western Union ATS, Inc.*, 958 F.2d 1388, 1395 (7th Cir. 1992) (Posner, J.) (fear of deciding state law issues incorrectly is "groundless [because] [s]tate courts are not bound by federal courts' interpretations of state law. A state judge will give such interpretations no more weight than their persuasiveness earns them").

Leaving certification decisions to the courts' "sound discretion" is a beneficial screening mechanism that achieves the correct balance in our federal system.

B. The Court Of Appeals Did Not Abuse Its Discretion By Denying Petitioner's Motion For Certification.

The Eighth Circuit has implemented the broad discretion conferred in *Lehman* by developing a reasoned and multi-factored approach to certification rulings. Among other factors, it looks to whether state court decisions provide "enough guidance" to prevent the question at issue from being an "extremely close one." *Perkins* v. *Clark Equip. Co.*, 823 F.2d 207, 210 (8th Cir. 1987); see also *Johnson* v. *John Deere Co.*, 935 F.2d 151, 154 (8th Cir. 1991); *Hatfield* v. *Bishop Clarkson Mem. Hosp.*, 701 F.2d 1266, 1267 (8th Cir. 1983). Its approach is thus entirely consistent with this Court's recognition that it would be "inappropriate" to certify absent an "uncertain question of state law." *City of Houston* v. *Hill*, 482 U.S. 451, 471 (1987). See also 17A Wright, Miller, & Cooper, *supra*, § 4248, at 173 (1988) ("Questions ought not be certified if the answer is reasonably clear").

The Eighth Circuit also considers whether the question at issue is likely to recur (*Perkins*, 823 F.2d at 210), and, in the absence of precedent, the extent to which it implicates the state's public policy. *Kaiser* v. *Memorial Blood Ctr.*, 938 F.2d 90, 93 (8th Cir. 1991). These considerations are consistent with those utilized by other federal courts, disproving petitioner's contention (Pet. 25) that this Court needs to establish additional certification guidelines. See Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 Ark. L. Rev. 305, 320-321 (1994) (summarizing certification guidelines used by lower federal courts); 17A Wright, Miller, & Cooper, *supra*, at 173-174. In fact, so well settled are the factors used to guide federal courts' discretion on

certification decisions that petitioner is unable to identify a single difference among the circuits.

In this case, as we have demonstrated above (at 14-20), the court of appeals found ample guidance from Minnesota case law to render a reasoned decision on the state choice of law issue. It painstakingly sifted through the state cases to determine how Minnesota courts would rule. After finding that there was a true conflict between Minnesota and Nebraska law, the court of appeals found it "relatively easy" to determine that both Nebraska's statute of repose and Minnesota's useful life statute were substantive in nature, based on at least six decisions by Minnesota state courts. Pet. App. 4a-8a. Then, following the Minnesota Supreme Court's en banc analysis in *Milkovich*, the court applied the relevant Leflar factors to the question at hand.[8] In doing so, the court relied on numerous Minnesota Supreme Court and appellate court decisions, carefully applying their principles to the facts of this case. Pet. App. 13a-14a.

This is not a situation, then, where guidance from the state courts was lacking. Choice of law is not a question of great "novelty," nor one over which Minnesota law is in "great unsettlement." *Lehman*, 416 U.S. at 391. Nor were there any "unusual circumstances" that might warrant certification. See *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988). Given the host of choice of law decisions from Minnesota courts cited by the court of appeals, and the specific guidelines set forth in those decisions, it is unremarkable that the court rejected petitioner's motion to certify the routine choice of law issues presented in this case. There

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[8] The Minnesota Supreme Court has long held that the "peculiar" facts of each case determine which of the Leflar factors bear on choice of law issues. *Hague*, 289 N.W.2d at 48; see pages 15-17, *supra*. Such a fact-bound approach makes choice of law questions particularly unsuited for certification and further supports the Eighth Circuit's decision not to certify.

is no need for this Court to review the Eighth Circuit's decision not to certify.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] The district court similarly had no difficulty in determining Minnesota law on the choice of law questions and in deciding there was no need to certify them to the Minnesota Supreme Court. Pet. App. 48a. Both courts below accordingly exercised their discretion in precisely the same manner.